No. 3293.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
George H. King, Individual, Doing Business as George H. King Rubber Company, and Also as George H. King Tire Company,
Bankrupt.

Wm. H. Moore, Jr., Trustee in Bankruptcy,
Appellant,
vs.
Empire Tire & Rubber Company, a Corporation,
Appellee.

APPELLEE'S BRIEF.

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ARGUMENT.

The facts of this case are so clearly and logically stated by the referee in his findings [Tr. p. 138 *et seq.*] that we regard it as sufficient to refer to that statement, and to disregard the misleading and piece-meal

statement made by the appellant. We should call attention, in connection with appellant's paragraphs 6 and 7 on his page 41, to the court's finding [Tr. p. 141] that the representative of the Empire Tire & Rubber Company went to the bankrupt's place of business regularly at the end of each month and checked over the tires belonging to the Empire Tire & Rubber Company on hand with the bankrupt, and made up a statement marked "Regular Account" of the goods sold by King during the month and the amount due to the Empire Company therefor. And [Tr. p. 142] no goods were ordered by King, but that the stock was kept complete and full by the Empire Company on its own motion.

The agreement between the Empire Company and King was entirely oral. If there was a failure to provide expressly concerning some conditions which appellant thinks might well have been agreed upon to make the transaction more clearly a factor relationship, the court must look to the meaning of the terms used by the parties and to the method used in carrying out the agreement. The transaction was spoken of throughout the relationship as a "consignment for sale." It was the clear understanding and the careful practice of the parties that no tires were paid for until they had been sold by King. In Cass v. Rochester, 174 Cal. 361, the court said:

> "The word 'consignment' does not imply a sale. The very term imports an agency, and that the title is in the consignor."

A simple agreement to "consign" goods for sale is in itself an agreement that the title to the goods remains in the consignor until the goods are sold by the consignee.

It is well settled by a long line of cases that a failure in the consignment agreement to fix the price at which the factor shall sell the goods, or a failure to specify that the proceeds of the sale shall be kept separate by the factor, or a failure to require the goods to be kept separate and identified, do not make of the contract an agreement to sell instead of an agreement to consign for sale. In Cass v. Rochester, 174 Cal. 361, the court said:

> "The plaintiff relies upon the circumstance that defendant was to remit a fixed sum, irrespective of the amount for which he might sell the property. This, it has often been held, is not inconsistent with the relation of principal and factor. 'We do not think,' said the court in Harris v. Coe, *supra,* 'that the absence of a limitation upon the price at which goods may be sold by a consignee who is to account to his consignor at a fixed price will transform an agreement made in good faith and clearly intended by both parties to be one of agency, into a contract of sale.' "

In Vermont Marble Company v. Brow, 109 Cal. 236, marble was delivered to the consignee to be held by him on a consignment for sale in his own name, to be paid for when sold, and to remain the property of the consignor until paid for. The consignee was at liberty to sell for any price he chose. While the marble was in the consignee's possession it was seized on a

writ of execution against him. In this action against the constable by the consignor for the recovery of the marble, the court held that the title to the marble was in the consignor, who could retake the property from the constable who had seized it on execution.

In the case of *In re* Columbus Buggy Company, 143 Fed. 859 (C. C. A. 8 Cir. 1906), the court, in considering a petition such as the one in the instant case under a selling agreement where the consignee was to sell at such price it saw fit, and to pay to the consignor the wholesale price, less 5% discount for payment before the 10th of the month, said:

> "A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods at agreed prices, that he will bear the expense of insurance, freight, storage and handling, and that he will hold the unsold merchandise subject to the order of the furnisher, discloses a bailment for sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. * * * The fact that such contract provides that the receiver of the goods may fix the selling price and may retain the difference between the agreed prices of the accounting and the selling prices to compensate him for insurance, storage, commission, and expenses, does not constitute the contract an agreement of sale."

See also:

John Deere Plow Co. v. M'Davitt, 137 Fed. 802 (C. C. A. 8 Cir. 1905);

Wright-Dana Co., 211 Fed. 908 (C. C. A. 2 Cir. 1914);

Kaiser v. National Home Supply Co., 226 Fed. 840.

In the case of *In re* Flanders, 130 Fed. 560 (C. C. A. 7 Cir.), the court said:

> "The objection that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit on the sales, that he guaranteed sales and that he insured in his own name, do not change the nature of the transaction. It is quite competent for a bailee by contract to enlarge his common law liability without converting the bailment into a sale. There is nothing in the evidence which indicates a pretentious agreement with a view to defraud creditors."

In the appellant's model case of General Electric Company v. Brower, 221 Fed. 597, the court said:

> "Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other moneys or that it should turn over the moneys received from the sale to the manufacturer, but instead was to pay for the lamps sold each month less twenty-nine per cent for making the sales."

There can be no doubt from a consideration of these cases (no attempt has been made to be exhaustive) but that as between the parties the whole transaction was just what it was understood to be, that is, an agreement of principal and factor, or of consignment for sale with the title reserved in the consignor. As between the parties the same situation existed in Miller Rubber Company v. Citizens Bank, 233 Fed. 488. In that case the court said on page 491:

> "As between parties to this contract we are unable to make anything more of it than what it purported to be, namely, a mere consignment of the goods to the W. D. Newerf Rubber Company for sale upon the terms and conditions therein stated."

The appellant must rely on some theory under which the transaction, although a consignment arrangement as between the parties with title in the consignor, became a sale with title in the consignee as against the general creditors of the consignee. The theory on which he must rely is thus stated in General Electric Company v. Brower, *supra:*

> *"To constitute a sale there must have been in the contract a vendor and a vendee and a provision for a transfer of the property by the vendor to the vendee and an obligation by the vendee to pay an agreed price therefor. Or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale.* There are no such circumstances here. The stipulated facts do not

in any way impeach the *bona fides* of the contract itself."

The court in the Miller Rubber Company case, after approving the above quotation, went on:

> "The same thing was in effect held by the Supreme Court in the case of Ludvigh v. American Woolen Company. There were in neither of those cases such fraudulent circumstances; but we do not think that that can be affirmed of the present case, for here not only was the agent permitted to mingle the consigned goods with his own stock but the contract expressly provided that the consignor would furnish the consignee 'free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the consignee.' It is difficult to see how the consignors could have more effectually held the consignee out to its customers as the real owner of its consigned property. *To permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would in our opinion operate as a fraud on the creditors of the bankrupt.*"

The consignor, and as between the parties the owner of the property, was held to be estopped from asserting title as against the trustee in bankruptcy and the general creditors because he had held the consignee out to his customers as the real owner of the consigned property. There was such a holding out of the consignee as owner not only by permitting the consigned goods to be mingled with his own stock, but the contract between the consignee and the consignor

expressly provided that the consignor would furnish the consignee free of charge all samples of tires and accessories and necessary advertising matter *imprinted with the name and address of the consignee.* There was a further holding of the consignee out as owner, so the court says:

> "In the provision that, when the agent desired, four months notes, drawing interest at 5%, will be accepted by first parties in settlement *for all purchases made by second party from first parties.*"

In Taylor v. Fram, 243 Fed. 733, the court sets forth the doctrine which must be applied here in deciding whether the transaction which, as between the parties is an agency, will be construed as a sale against the creditors. They say the transaction will be considered as passing title:

> "(1) If fraud is shown in the original contract of agency; (2) If the parties to the contract have so acted as to estop themselves from denying the legal effect of acts which they are seeking to explain; and which tend to accomplish what would cause a fraudulent result; (3) Where there has been a breach in the contract sufficient to indicate that the consignee was not carrying out the contract of agency, and where the consignor has then so acted upon the breach as to show with respect to future consignments that title passed in the transactions and they were sales instead of bailments."

In applying the facts in the case at bar to the doctrine above set forth, it must be decided whether any

of the three conditions mentioned in Taylor v. Fram exist here. It is not proper to say that the court found those conditions, or some of them, existed in the Miller Rubber Company case, and that some of the facts here are similar to some of the facts in that case, as appellant attempts to point out by his "arabic" analysis of the Miller case. We have not before us all of the facts of the Miller case upon which the court decided it. We know that the court was influenced by the fact that the goods were advertised and sold in such a manner as to lead the public to believe that the consignee was the owner. The court found further that the owner was estopped to assert a title to the goods as against the creditors. We do not know what reliance the creditors placed on such holding out of the consignee, nor what damage the creditors suffered by relying on such holding out.

In the King case there is no fraud charged or proved. There was no holding out of King as the owner of the tires by any active representation by the Empire Company. The holding out as owner by making King the factor when he was engaged in the business of selling tires at retail cannot be relied on by innocent parties any further than it was allowed to be relied upon by pledgee in Wright v. Solomon, 19 Cal. 64, where the court said:

> "Thus, the delivery of goods to a merchant engaged in the sale of articles of a similar kind, is such evidence of the bestowal of the right to dispose of the same, as to protect the purchaser from the possessor. The possession under such circumstances is evidence, *not that the possessor*

> *is owner,* but that he has received authority from the owner to sell."

There was no evidence in the King case of any reliance put on the acts of the Empire Company in investing King with possession with power to sell. There is no evidence of any damage suffered by reliance thereon by any creditor.

The trustee must depend upon the doctrine of estoppel. It must be found that the circumstances were such that the Empire Company cannot be allowed to say as against the trustee that there was not a sale. To establish this the trustee relies upon the fact that the goods were put into the possession of a person engaged in the business of selling tires with power to sell them and with the ostensible ownership.

The court, in Barnhart v. Fulkerth, 93 Cal. 499, said:

> "One of the necessary elements of estoppel is that the party setting it up must have been actually induced to do a certain act by the conduct or direction of the party sought to be estopped."

and in the case of First National Bank v. Maxwell, 123 Cal. 367, said:

> "But it is an essential element of estoppel by conduct that the party claiming the estoppel should have relied upon the conduct of the other and was induced by it to do something which he otherwise would not have done."

Counsel for the trustee has not only failed to prove under the doctrine of Wright v. Solomon that King was invested with the apparent absolute ownership but has failed to introduce any evidence which will bring the trustee within the doctrine of the two cases above cited to entitle him to assert that the Empire Company is estopped to set up its ownership.

We submit that the judgment of the court below should be affirmed.

Respectfully submitted,

JOHN W. KEMP,

Attorney for Appellee.